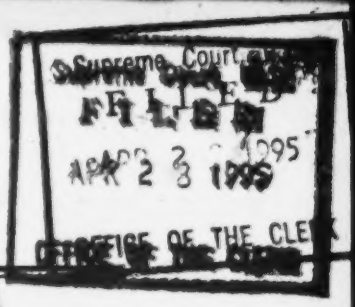

NO. 94-1590

In The
Supreme Court of The United States
October Term 1994

MICHAEL J. CRAWLEY,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Writ Of Certiorari
To The Ohio Court of Appeals
For The Twelfth Appellate District
at Warren County, Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it is a violation of the United States Constitution to retroactively apply United States vs. Dixon, 509 U.S. -, 125 L. Ed. 2d 556 (1993), to a factual situation arising prior to the overruling of the double jeopardy "same conduct" test of Grady vs. Corbin, 495 U.S. 508 (1990).

II. Whether the issue of vagueness of the definition of "serious physical harm," an essential element of the charge of aggravated vehicular assault" under the Ohio Revised Code, is properly before this Court.

III. Whether the definition of "serious physical harm," an essential element of the charge of "aggravated vehicular assault" under the Ohio Revised Code, is unconstitutionally vague.

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MICHAEL J. CRAWLEY, Petitioner,

vs.

STATE OF OHIO, Respondent.

BRIEF IN OPPOSITION TO PETITION
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent would only offer in addition to Petitioner's list of Constitutional and Statutory Provisions the full text of the definition of "serious physical harm to persons" found in Ohio Revised Code Section 2901.01(E).

> (E) "Serious physical harm to persons" means any of the following:
>
> > (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(2) Any physical harm which carries a substantial risk of death;

(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;

(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

STATEMENT OF THE CASE

On October 16, 1992, Michael J. Crawley (hereinafter "Petitioner") operated an automobile in a head-on collision with Travis Breeze. Petitioner was charged with failure to control, a violation of Ohio Revised Code Section 4511.202, and aggravated vehicular

assault, a violation of Ohio Revised Code Section 2903.08. The former charge is a traffic offense; the latter is a felony offense. Petitioner pled no-contest to the traffic offense and was found guilty on November 5, 1992. A preliminary hearing on the felony charge was held on December 3, 1992, and Petitioner was indicted on January 4, 1993. The indictment charged Petitioner with one count of aggravated vehicular assault with a physical harm specification, in violation of Ohio Revised Code Sections 2903.08(A) and 2941.143 respectively.

Petitioner's Motion to Dismiss Indictment was overruled by the Warren County Common Pleas Court on April 20, 1993. The Common Pleas Court reversed itself on August 17, 1993, and dismissed the indictment on double jeopardy

grounds; but overruled dismissal on vagueness grounds.

Dismissal on double jeopardy grounds rested on this Court's decision in Grady v. Corbin. The Respondent appealed this decision. This Court overruled Grady on June 28, 1993, nearly seven weeks before the trial court's decision.

The Twelfth District Court of Appeals, citing this Court's decision in United States v. Dixon, reversed the trial court in a decision filed July 8, 1994. The Ohio Appellate Court held that the test of Grady v. Corbin was extinct and application would not operate as an ex post facto violation. That court did not decide Petitioner's statutory vagueness allegations because Petitioner's appeal of the trial court decision was not a final appealable order

and any comment on that claim at that time would constitute an advisory opinion.

Petitioner appealed to the Ohio Supreme Court for discretionary review. That appeal was denied.

REASONS FOR DENIAL OF THE WRIT

I. Summary of Argument

The issues raised by Petitioner have been addressed by this Court on numerous occasions. The law on these points have been firmly decided by this Court in recent years. There is no cause to revisit these past decisions in light of the facts in the present matter. Therefore, the petition for Writ of Certiorari in this matter should be denied.

Petitioner asserts that retroactive application of United States v. Dixon to

his case is unfair and prejudicial. However, under three distinct lines of reasoning, application of Dixon to the present case is justified and present review unnecessary.

This Court has the duty to decide cases in conformity with the United States Constitution. To the extent that previous decisions depart from that level of conformity, this Court has the clear power to overrule those inconsistent opinions. It is clear that this Court's decisions declare what the Constitution means. This meaning is to be applied equally to all concerned - defendants similarly situated; governments similarly situated. Past decisions have applied interpretations of the Constitution to the parties before the Court. The Petitioner in this cause is no different.

A wrongly decided case, once overruled, should not be resuscitated.

Furthermore, application of Dixon to the present case is not an ex post facto violation of the United States Constitution. Case law related to deprivation of defenses constituting ex post facto violations have long held that the defenses referred to are those of justification or excuse. This Court recently reaffirmed that position in Collins vs. Youngblood, 497 U.S. 37 (1990). Dixon correctly overruled Grady and interpreted the Double Jeopardy Clause in a way supported by a long line of this Court's decisions. The holding in Dixon was foreshadowed by this Court's decision in United States vs. Felix, 503 U.S. 118 L. Ed. 2d 25 (1992). Petitioner's assertion of reliance rings

hollow. Petitioner's actions were clearly proscribed by law.

Petitioner cites a line of cases that evaluate the issue of reliance on past decisions in determining whether retroactive application is necessary. This Court eliminated reliance as a factor in determining the retroactivity of criminal rules. This equally applies to decisions interpreting the Constitution. Petitioner fails to indicate how the logic of that line of cases eliminating reliance as a factor does not apply to his position.

Assertions that the statute at issue in this case is unconstitutionally vague are equally well settled against Petitioner's position. In the first instance, this portion of the petition is not subject to review. Petitioner's

cross appeal on the issue of vagueness was not decided by the Ohio Appellate and Supreme Courts because the Appellate Courts would have had to render an improper advisory opinion. This decision is founded on legitimate state grounds and the Federal question is not available for review.

Were this Court to find this issue properly before the Court to entertain a writ of certiorari, this statute does not warrant another visit to this Court's decisions on the void for vagueness doctrine. Petitioner's conduct is clearly forbidden in terms understandable to ordinary citizens. Furthermore, the statute provides sufficient criteria to avoid concerns of discriminatory and arbitrary enforcement.

II. First Question Presented for Review: Retroactive application of the decision by this Court in United States vs. Dixon did not violate Petitioner's constitutional rights.

A. Retroactive application is appropriate where Court is interpreting the United States Constitution.

It is axiomatic that this Honorable Court has the inherent authority to review its own decisions. Decisions are occasionally overruled because "when convinced of former error, this Court has never felt constrained to follow precedent. . . . This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the

principle itself." Smith vs. Allwright, 321 U.S. 649, 665-66 (1944). The Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, is a constitutional principle to be applied, not extracted. Petitioner's argument that the Dixon decision should not apply to him is untenable. Justice Scalia addressed the issue of retroactive decisions as follows:

> "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense."

American Trucking Associations, Inc. vs. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

Making its decisions conform to the Constitution is precisely what this Honorable Court did in Dixon. Prior to its decision in Grady vs. Corbin, 495 U.S. 508 (1990), this Court had clearly and consistently held that a second prosecution may proceed so long as it was not for the same offense. Gavieres vs. United States, 220 U.S. 338 (1911) (double jeopardy protection is "against second jeopardy for the same offense"); Burton vs. United States, 202 U.S. 344 (1906) (doubly jeopardy plea fails "if the offenses charged in the two indictments be perfectly distinct in point of law, however, nearly they may be connected in fact"). The test that offenses are not the "same offense" so long as they have different elements was

expressly stated in Blockburger vs. United States, 284 U.S. 299 (1932).

The Blockburger test worked in tandem with the well-settled constitutional rule that prosecution for a lesser included offense bars prosecution for the greater offense. A greater offense is the same for double jeopardy purposes as any lesser included offense. Brown vs. Ohio, 432 U.S. 161 (1977). This principle was followed in Harris vs. Oklahoma, 433 U.S. 682 (1977) and Illinois vs. Vitale, 447 U.S. 410 (1980). These two principles were understandable and workable prior to the decision of Grady. These decisions adequately insured that a defendant would not be placed twice in jeopardy for the same offense.

Petitioner asserts his case should be governed by Dixon because the similarity of the fact patterns between his case and the overruled Grady case. He asserts this similarity created a "reliance" interest in which he is entitled to seek shelter. Petitioner cites no authority for the proposition that this higher reliance creates a protection from Dixon not afforded to the Defendant in Dixon itself. The Double Jeopardy Clause is of constitutional magnitude and applies equally to all defendants. Interpretation of that clause applies equally to all defendants.

Petitioner ignores the fact that the interpretation set forth in Dixon was applied to the parties before the Court in that case. Trial on four counts of the Foster indictments in Dixon was

permitted on remand in that case. Undoubtedly Foster "relied" on the Grady holding in support of his position that double jeopardy applied. It is a fundamental of constitutional adjudication that similarly situated defendants be treated equally. See Griffith vs. Kentucky, 479 U.S. 314 (1987). Dixon is not the only time this Court has changed its interpretation of double jeopardy and permitted a second trial of the defendant.

This Court in United States vs. Scott, 437 U.S. 82 (1978) overruled the decision in United States vs. Jenkins, 420 U.S. 358 (1975). Jenkins held that any dismissal, whether by the court, the Government, or defendant, other than a mistrial, made after jeopardy had attached but prior a finding by the trier

of fact barred any appeal by the Government. Id. at 370. This Court held that a successful Government appeal would require further court proceedings to resolve defendant's guilt or innocence and would constitute a second placement in jeopardy for the same offense.

At trial in Scott, defendant moved for dismissal due to prejudice of pre-indictment delay. That motion was granted after all evidence had been received but prior to submission to the jury. The Government's appeal was denied by the Court of Appeals under authority of Jenkins. Id. at 84.

This Court noted that it had extensively analyzed the history of the Double Jeopardy Clause in Jenkins and

companion cases.[1] This Court, however, stated "our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that Jenkins was wrongly decided." Id. at 87. This Court found it had overstated the risk of Defendant's conviction upon a successful Government appeal. Scott's case was reversed and remanded for further proceedings.

This Court has applied its decisions adjusting its interpretation of the Double Jeopardy Clause to the parties in the cases where the decision was announced. It is unquestioned that the same interpretation should be applied to all cases on subsequent review. Grady "was a mistake". Dixon, supra, 509 U.S.

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[1]United States vs. Wilson, 420 U.S. 332 (1975), and Serfass vs. United States, 420 U.S. 377 (1975).

-, 25 L. Ed. 2d at 577. Its folly should not be perpetuated.

B. Retroactive application is not an Ex Post Facto violation.

It is well settled that the Ex Post Facto Clause of the United States Constitution applies to the power of legislatures. Marks vs. United States, 430 U.S. 188 (1977). An ex post facto law punishes an act innocent when committed; imposes punishment for crime more onerous than when committed; or deprives one of a defense to a crime available when committed. Beazell vs. Ohio, 269 U.S. 167 (1925). In certain circumstances, a judicial interpretation expanding the scope of a statute operates similar to an ex post facto law. Marks vs. United States, 430 U.S. 188 (1977);

Bouie vs. City of Columbia, 378 U.S. 347 (1964).

This Court recently stated that an ex post facto violation occurs when [a] law . . . abolishes an affirmative defense of justification or excuse . . . because it expands the scope of a criminal prohibition after the act is done." Collins vs. Youngblood, 497 U.S. 37, 49 (1990) (emphasis added). The same logic holds true when a judicial decision abolishes an affirmative defense of justification or excuse. While the raising of double jeopardy may be broadly stated to be a defense, it is not a defense of justification or excuse. The types of defenses referred to in Beazell are those of justification or excuse.

At least two Federal Circuits have adopted this interpretation of Beazell.

In United States vs. Knipp, 963 F. 2d 839 (1992), the Sixth Circuit stated the term defense in Beazell:

> "does not have the much broader meaning assigned to it by defendants, because a plea in bar is not related to the definition of a crime and is not pleaded as a nullification of one or more of the elements or as an excuse or justification for its commission."

Id. 963 F. 2d at 843. The Fifth Circuit, in United States vs. Brechtel, 997 F. 2d 1108 (1993), stated that only the loss of a defense of justification or excuse is prohibited by Beazell. Id. at 1113.

Petitioner asserts that application of Dixon detrimentally impacts his position in the trial court. This Court has stated that the mere fact that a change works a disadvantage on a defendant is an ex post facto violation "departs from the meaning of the [Ex Post Facto] Clause as it was understood at the

time of the adoption of the Constitution, and is not supported by later cases." Collins, 497 U.S. 37 (1990) (overruling Kring vs. Missouri, 107 U.S. 221 (1883)).

Petitioner claims that he relied on Grady; however, Petitioner's reliance on Grady is apparitional. Petitioner was charged with two different violations. Neither of these were statutes that criminalized his acts after he committed them. Neither of these statutes increased his punishment. Neither of these statutes deprived him of a defense of justification or excuse. Furthermore, the continued vitality of Grady was clearly in doubt as a result of this Court's decision in United States vs. Felix, 503 U.S. -, 118 L. Ed. 2d 25. Felix was decided nearly six months prior to the events which prompted the charges

pending against Petitioner. Petitioner cited and utilized an erroneous court decision in the hope of avoiding further prosecution. Petitioner is still subject to the same two statutes. He has not been exposed to additional criminal liability. Accordingly, Petitioner received "fair warning" that his actions were in violation of those two state statutes. See Bouie, supra, at 350. His due process rights were not violated.

C. Reliance no longer a factor in determination of retroactivity of constitutional decision in criminal case.

Petitioner erroneously cites Griffith vs. Kentucky, 479 U.S. 314 (1987) for the proposition that reliance on current law is a ground for determining whether to give retroactive

effect to a constitutional interpretation. This Court held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the rule constitutes a 'clear break' with the past". Id. at 328. That decision rejected the factors asserted in Linkletter vs. Walker, 381 U.S. 618, 636 (1965) and Stovall vs. Denno, 388 U.S. 293, 297 (1967); See Harper vs. Virginia Department of Taxation, 509 U.S. - , 113 S. Ct. -, 125 L. Ed. 2d 74, 85 (1993) ("We subsequently overruled Linkletter in Griffith vs. Kentucky" (Thomas, J., writing for the court)).

This Court concisely stated the rationale for the Griffith retroactively

rule was "that it was unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct appeal at the same time." American Trucking Associations, supra, at 197. Reliance interests of the defendant or government are no longer considered. Id. at 198.

While Griffith and its progeny address issues of changes in criminal procedure, its rationale is equally appropriate in applying interpretations of constitutional protections to criminal defendants. It applies with greater force in this case. The Constitution applies to all persons at all times.

The present case is distinguishable from Griffith in one respect. Griffith applied full retroactive effect to new rules of criminal procedure. This Court

in Dixon did not create a new rule or interpretation of the Double Jeopardy Clause. This Court righted itself and applied long established and well understood double jeopardy doctrine.

III. Second Question Presented for Review: Issue of vagueness of statute not decided by Court from where writ is sought to issue.

The petition in the present case as it relates to Petitioner's assertion that the Ohio definition of "serious physical harm" is unconstitutionally void for vagueness should be disallowed. Where no Federal question was decided by the state court, no writ of error should issue. Cincinnati, N.O. & T.P.R. Co. vs. Slade, 216 U.S. 78, 83 (1910). This Court has held that it will only issue writs of error/certiorari for questions that could

have been or ought to have been passed on by the Court to which the writ will issue. Fashnacht vs. Frank, 23 L. Ed. 81, 82 (23 Wall. 416, 420) (1875).

The Court of Appeals for the Twelfth District of Ohio held Petitioner's cross appeal alleging unconstitutionality of the statute was based on an order that was not final. The Appellate Court held that any decision at that time on that issue would constitute an advisory opinion. State vs. Crawley, 96 Ohio App. 3d 149, - N.E. 2d - (1994). The Federal question was not decided at that time on legitimate state grounds.

This Court has stated:

> "[w]ithout any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less

> applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

Nickel vs. Cole, 256 U.S. 222, 225 (1921); Wolfe vs. North Carolina, 364 U.S. 177, 195 (1960). Under these cases, the issue of constitutional vagueness is not before this Court.

IV. Third Question Presented for Review: Ohio's definition of "serious physical harm" as used in its statute for "aggravated vehicular assault" is not unconstitutionally vague.

The statute at issue in this case is clearly free of constitutional challenge on vagueness grounds. A criminal statute is not vague if it defines the offense narrowly enough that the ordinary citizen understands the act is criminal. Papachristou vs. Jacksonville, 405 U.S.

156, 162 (1972) (citing Lanzetta vs. New Jersey, 306 U.S. 451, 453 (1939)). The statute must also be phrased in such a manner that law enforcement personnel and finders of fact are not afforded an opportunity to arbitrarily and discriminatorily apply the statute to a particular act. Grayned vs. City of Rockford, 408 U.S. 104, 108-09 (1972). See also Kolender vs. Lawson, 461 U.S. 352 (1983).

This Court has placed greater emphasis on the second aspect of vagueness, whether there are minimal guidelines to assist officers, judges and juries. Kolender, supra,. The statute challenged by Petitioner lists five separate subdivisions to guide officers in determining probable cause to arrest and juries in finding proof beyond a

reasonable doubt as to what is "serious physical harm". This statute achieves the balance sought by the vagueness doctrine.

In Colten vs. Kentucky, 407 U.S. 104 (1972), this Court wrote the vagueness doctrine:

> "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statues both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Id. at 110. The statute in the present case clearly satisfies this requirement.

IV. Conclusion

Wherefore, for reasons set forth above, the Respondent respectfully

requests this Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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